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IN THE

Supreme Court of the United States

October Term. 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

The Interest of the Amicus Curiae 1

Argument 2

I—The Application Of The Exclusionary Rule Is Constitutionally Required In This Case. The Rule Should Not Be Modified. Its Sanction Is Essential To Control The Arbitrary Exercise Of Police Power. 2

II—Modification Of The Exclusionary Rule In This Case Would Increase The Already Existing Abuse Of The Rights Of Minority Group People 8

III—The Modification Or Elimination Of The Exclusionary Rule Threatens Further Incursions On The Protections Of Freedom Of Expression Erected By The Fourth Amendment. 13

Conclusion 15

CASES CITED

Beck v. Ohio, 379 U.S. 89, 97 (1964) 2

Elkins v. United States, 364 U.S. 206, 216 (1960) 6

Hairston v. Hutzler, 331 F. Supp. 251, 253 (W.D. Pa. 1971) aff'd 468 F. 2d 621 (3 Cir. 1972) 10

Henry v. United States, 361 U.S. 98 (1959) 4

Johnson v. United States, 333 U.S. 10, 13-14 (1948) 3

Lankford v. Gelston, 365 F. 2d 197 (4th cir. 1966) 10

Mapp, 367 U.S. at 655 3

Marcus v. Search Warrant, 367 U.S. 717, 724 (1961) 13

McDonald v. United States, 335 U.S. 451, 455-456 (1948) .. 2

Michigan v. Tucker, 417 U.S. 433 (1974) 4

Olmstead v. United States, 277 U.S. 438, 462 (1928) 3

People v. Collier, Supreme Court New York County, Indictment Nos. 3604-05, McQuillan J., July 28, 1975 (unreported) 6

Rice v. Wolff, 513 F. 2d 1280, 1288 (8th Cir. 1975) 4

Silverthorne Lumber Company, 251 U.S. 385, 392 (1920) .. 3

Stanford v. Texas, 379 U.S. 476 (1965) 13

Terry v. Ohio, 392 U.S. 1, 22 (1968) 4

Terry v. United States, 392 U.S. at 13 17

United States v. Calandra, 414 U.S. 338 (1975) 4

United States v. Peltier, — U.S. —, 95 S.Ct. 2313 (1975) .. 4

United States v. United States District Court fot the Eastern District of Michigan, 407 U.S. 297 (1972) 13

Weeks v. United States, 232 U.S. 383, 391-393 (1914) 2

Weeks and Mapp v. Ohio, 367 U.S. 643 (1961) 3

Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) 12

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CHARLES L. WOLFF, JR., warden of the
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On Petition For Writ of Certiorari to the
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BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AS *AMICUS CURIAE*

This brief of the National Alliance Against Racist and Political Repression (the Alliance) as *Amicus curiae* in support of respondent is filed with the written consents of the parties which have been filed with the Clerk.

THE INTEREST OF THE AMICUS CURIAE

The Alliance, founded in 1973, is a multiracial organization composed of local branches, affiliated national organizations and individual members throughout the United States. Its purpose is to work for the elimination of racist and political repression from our national life by means of activity in the fields of education, legislation and legal defense. It is particularly concerned with manifestations of racism in the criminal process and the penal system.

In this case, the Court is presented with the question among others, of whether the exclusionary rule should be modified so as

to admit evidence obtained in violation of well-established constitutional standards. What the Court does here may have an important impact on the right of minority-group people and political dissenters to be free from unlawful searches which cast in their net indiscriminately, people of color or of unorthodox views. This issue also raises substantial questions affecting First Amendment rights of minority-group people and political dissenters to organize and to engage in lawful political activity, unhampered by illegal police invasions. We argue here solely the constitutional requirement of the application of the exclusionary rule to this case and the importance of maintaining the rule intact. We adopt as our own the arguments so ably made in respondent's brief.

ARGUMENT

I

THE APPLICATION OF THE EXCLUSIONARY RULE IS CONSTITUTIONALLY REQUIRED IN THIS CASE. THE RULE SHOULD NOT BE MODIFIED. ITS SANCTION IS ESSENTIAL TO CONTROL THE ARBITRARY EXERCISE OF POLICE POWER.

Just as distrust of uncontrolled power is at the heart of the Fourth Amendment so distrust of uncontrolled police power is at the heart of the rules devised by the Court in giving content to the Fourth Amendment in criminal cases. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct. See *Weeks* v. *United States*, 232 U.S. 383, 391-393 (1914); *Beck* v. *Ohio*, 379 U.S. 89, 97 (1964). Indeed the Fourth Amendment requirement that a magistrate issue the search warrant is also bottomed on this principle. As the Court, in *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948) said:

> [T]he Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

See also *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948).

The application of the exclusionary rule in this case is constitutionally required. The Court in *Weeks*, 232 U.S. at 393, 398, and in *Mapp*, 367 U.S. at 655, explicitly held that the use of evidence obtained by an illegal search and seizure is barred by the Fourth Amendment. See also *Silverthorne Lumber Company*, 251 U.S. 385, 392 (1920); *Olmstead v. United States*, 277 U.S. 438, 462 (1928).

The exclusionary rule is applicable to this case under well established principles of law. The evidence was obtained in violation of existing standards prevailing at the time of the search. The search was made either 1) under an invalid search warrant issued without probable cause to believe that the objects sought were in respondent's home at the time of the search, or 2) under an arrest warrant for a third person without probable cause to believe that the person sought was in respondent's home at the time of the search.

In practical effect petitioner and its supporting *amici* seek to persuade this Court to overrule its holding, in *Weeks and Mapp* v. *Ohio*, 367 U.S. 643 (1961, that the exclusion of evidence obtained in violation of the accused's Fourth Amendment rights is constitutionally mandated. They urge that the fruits of some unlawful searches and seizures would be permitted in evidence against persons so victimized where the police officer acted honestly and in good faith or where the crime was a serious one and the unlawful search and seizure was accompanied by good intent.

The subjective standards proposed by petitioner and its supporting *amici* eliminate the necessity for scrutiny by neutral magistrates, incites warrantless searches and reinstitutes the general warrant under the shape of an arrest warrant pursuant to which the privacy and homes of third persons are subject to search in the night time on suspicion, speculation or plain "hunch".[1] These standards have no support in law. The Court, in *Beck* v. *Ohio*, 379 U.S. at 97, in rejecting the subjective test of "good faith" conduct said:

> But "good faith on the part of the arresting officers is not enough." Henry v. United States, 361 U.S. 98, 102. If subjective good faith alone were the test of the protection the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police.

Anything less than the application of objective standards in determining whether police conduct meet the requirements of the Fourth Amendment "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction". *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (citing *e.g.*, *Beck v. Ohio*, 379 U.S. 89 (1964); *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959).

Petitioner and their supporters have seized upon what they consider to be a trend by the majority of this Court to downgrade the importance of the exclusionary rule. They rely heavily on language taken out of contest from *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Peltier*, —— U.S. ——, 95 S. Ct. 2313 (1975); and *United States v. Calandra*, 414 U.S. 338 (1975), to suggest that the Court has substituted new tests of

1. The Court below found the search warrant insufficient because the affidavit was primarily based on an informant's tip and there was nothing in the affidavit to show that the "tip was based upon more than mere rumor and speculation." *Rice v. Wolff*, 513 F. 2d 1280, 1288 (8th Cir. 1975). The Court also found that none of the evidence "shows that the police had a firm, concrete and otherwise reasonable belief that Peak was at respondent's house when they entered it." 513 F. 2d at 1292.

bona fides, good faith intentions and honest errors in place of the constitutional standards of probable cause. But these cases have no relevance to the issues here involved.

Peltier and *Tucker* involved the retroactive application of a new constitutional principle in circumstances where police officials had acted in accordance with well-established constitutional norms. The Court held that retroactive application of newly formulated constitutional principles would not be given in cases where police officers, at the time the evidence was obtained, complied with the then accepted constitutional norms. The Court did not abandon the exclusionary rule for good faith police conduct. The decisive standard was the objective one of compliance with the then-existing constitutional norms. It was this compliance which the Court characterized as good faith. Non-compliance with existing constitutional standards, even when accompanied by good faith does not meet the test of *Peltier* and *Tucker*.

In *Calandra*, the Court declined to extend the exclusionary rule to grand jury proceedings, at which questions based on illegally seized evidence were asked, although it deemed that such evidence was not admissible in the criminal trial. The view of the exclusionary rule expressed by the majority in that case was that the deterrent factor was served by the inhibiting knowledge that the fruits of an illegal search and seizure and any derivative evidence, even if used by the grand jury, could not be used in a criminal trial. (414 U.S. at 351-52); the very place where petitioner here seeks sanction for its use.

Petitioner and their supporting *amici* place their major emphasis upon the claim that the exclusionary rule was fashioned primarily as a deterrent and that it has failed in that purpose. They urge that the rule does not operate to prevent the good faith, honest error police officer or the blundering or miscreant police officer from violating the accused's right to be free from illegal searches and seizures. For the good faith and honest error officer could not be deterred from conduct he deemed consistent with the Fourth Amendment even if it was not, and the miscreant officer, in any event, would not be deterred for misconduct.

Petitioner and their supporting *amici* are concerned that the rule permits the guilty to go free and request the Court to scrap it on speculative reliance that other remedies, existing or proposed would be more effective. As this Court noted in 1960 even before *Mapp* was decided, "The exclusionary rule has for decades been the subject of ardent controversy . . . Most of what has been said in opposition to the rule was distilled in a single Cardozo sentence—'The criminal is to go free because the constable has blundered.' " *Elkins v. United States*, 364 U.S. 206, 216 (1960) (quoting, *People v. Defore*, 242 N.Y. 13, 21). It is safe to venture the opinion that this Court has not been free of the controversy since *Mapp* and that at each term of the Court the issue has been presented as though a new urgency was added to the fear that the "guilty" go free.[2]

The debates reflect genuine concern with the effectiveness of law enforcement agencies. The issue, however, is clouded with public partisanship, the most vocal of which is pressed by self-proclaimed proponents of law and order who have distorted its meaning to encompass government lawlessness in the solution of the problem of crime in our cities. They regard decisions of this Court, requiring that law enforcement officers comply with constitutional safeguards, as obstacles to the prosecution and conviction of criminals and urge that we "take the handcuffs off our police".[3] The claim that the rule fetters law enforcement has

2. Once cannot be too sanguine about how many so-called "guilty" who go free are in fact so. We believe that there is always a risk of reliability where evidence is illegally obtained. This is particularly true in cases involving Black Panthers. There has been so much admixture in such cases of informers, provocateurs, government inspired entrapment and planting of evidence including dynamite that we are never certain as to where the evidence had its origins. See e.g. Chevigny, *Cops and Rebels, A Study of Provocation* (1972); *People v. Collier*, Supreme Court New York County, Indictment nos. 3604-05, McQuillan J., July 28, 1975 (unreported) in an opinion granting motion to suppress and dismissing indictment, reported in *New York Times* July 29, 1975.

3. See e.g. Sondern, Take the Handcuffs Off Our Police, *Readers Digest*, Sept., 1964, 64-68, noted by Chief Justice Burger in *Who Will Watch the Watchman?*, 14 Am. U.L. Rev. 1, 22, n. 48 (1964).

been unsuccessfully pressed on the Court since the inception of the rule. See e.g. *Elkins*, 364 U.S. at 218-219; *Mapp*, 367 U.S. at 659-660. In *Mapp* the Court, after noting that "pragmatic evidence of a sort to the contrary was not wanting", rejected that consideration as an "ignoble short cut to conviction . . . [which] tends to destroy the entire system of constitutional restraints on which the liberties of the people rest", 367 U.S. at 659-60.

The emphasis placed on the so-called "failure" of the exclusionary rule as a deterrent misperceives its role in the deterrent process.[4] In the first place, one of the functions of the exclusionary rule is to inhibit improper police invasions which, if allowed, would hit hardest at countless numbers of unknown innocent people who are the most numerous victims of unlawful searches and whose abuse is never brought to the attention of the courts. As this Court said in *Terry v. Ohio*, 392 U.S. at 13 (1968):

> A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Those who urge modification of the exclusionary rule do not claim that there is no need to deter the police. This is patently clear from their claim that the rule fails to deter. There is general agreement that curbs on police power are necessary. In the second place, the exclusionary rule gives content to the Fourth Amendment by defining the standards of acceptable conduct. *Terry v. United States*, 392 U.S. at 13. Furthermore, while the

4. The claim of "failure" is based on inconclusive data. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709 (1970), who is frequently cited as authority for the claim, concedes that his findings which "represent the largest fund of information yet assembled on the effect of the exclusionary rule . . . obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." We do not agree that the rule fails as a deterrent even in the narrow sense used by petitioner. See Amsterdam, *Reflections on the Fourth Amendment*, 58 Minn. L. Rev. 349 at 475-6, n. 593 and authorities cited therein; see also *Elkins v. United States*, 364 U.S. at 218-221. We adopt as our own the arguments on this question made in Brief *Amicus Curiae*, American Civil Liberties Union.

exclusionary rule should never be regarded as the sole deterrent factor, its sanction is the indispensable core of a total system of deterrence which should involve not merely the judiciary, but the cooperation of law enforcement agencies. See Amsterdam, 58 Minn. L. Rev. at 409-434. And finally, as this Court has frequently observed, the elimination or narrowing of the sanction would incite disregard for the rights protected by the Fourth Amendment. See e.g. *Elkins v. United States,* 364 U.S. at 217.

II

MODIFICATION OF THE EXCLUSIONARY RULE IN THIS CASE WOULD INCREASE THE ALREADY EXISTING ABUSE OF THE RIGHTS OF MINORITY GROUP PEOPLE

It is a diversion from the real problems of society to focus in on the exclusionary rule as the cause of crime. The number of "guilty" persons at large because of the exclusionary rule is of no real significance and is hardly the source of crime. The threat is not from too much coddling of criminals but from too much abuse of the rights of the people residing in our "inner cities".

The special abuse by law enforcement agencies of Blacks and other minority group people has a long history.[5] Those residing in the ghettos and other poverty areas of our cities are daily

5. See generally National Capital Area Civil Liberties Union, *A Police Department in Trouble: Racial Discrimination and Misconduct in the Police Department of Washington, D.C.* (1968); and United States Commission on Civil Rights, *Mexican-Americans and the Administration of Justice in the Southwest* (1970). See also President's Commission on Crime in the District of Columbia, *Report,* (1966) at 203-208. Also Wolfgang and Cohen, *Crime and Race,* (1970); Rinella, *Police Brutality and Racial Prejudice: A First Close Look.* 45 J. Urban. L. 773 (1968) and Comment, *Socio-Legal Aspects of Racially Motivated Police Misconduct,* 71 Duke L.J. 751 (1971). Chevigny, *Police Power: Police Abuses in New York City* at 205-206, 208 (1969), (hereinafter *Chevigny*); Cray, *The Big Blue Line* (1967) at 173-176 (hereinafter *Cray*); and Bailey and Mendelsohn, *Minorities and the Police* (1969) at 130-132. We are indebted for the authority cited to Brief *Amicus Curiae* of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., in *Rizzo v. Goode,* October Term, 1975 no. 74-942 now pending before this Court.

subjected by police officers to humiliating and degrading violations of their constitutional rights and their right to be free from arbitrary searches and seizures.[6] The racism inherent in these violations has been widely acknowledged and in fact is frequently accompanied by overt racist verbal as well as physical abuse.[7]

Extensive studies in at least one city disclosed:

> In predominantly Negro precincts, over three-fourths of the white policemen expressed prejudice or highly prejudiced attitudes towards Negroes. Only one percent of the officers expressed attitudes which could be described as sympathetic towards Negroes. Indeed, close to one-half of all the police officers and in predominantly Negro high crime rate areas showed extreme prejudice against Negroes. The National Advisory Commission on Civil Disorders, *Report* at 306, New York Times ed., (1968) quoting the testimony of Professor Albert Reiss.

Illegal searches in the ghettos are commonplace. One authority on the subject noted that "Invasions of privacy, all in the good expedient law enforcement are so common as to be an integral part of police procedure." *Cray,* at 41; see also *Black and Reiss,* at 82, 85, 90; *Chevigny,* at 205-06, 208; The Presidents Commission on Law Enforcement and Administration of Justice: *Task Force Report: The Police* (1967) at

6. See e.g. *The Metcalfe Report on the Misuse of Police Authority in Chicago* The Chicago Defender, July 1973 (Special Supplement at 8); and Silberman, *Crisis in Black and White* (1964) at 50-53.

7. The National Advisory Commission on Civil Disorders, *Report* (New York Times ed., 1968) at 302-306 (hereafter *Report*); Reis, "Police Brutality—Answers to Key Questions", Transaction, at 10-19 (July-August 1968) (hereinafter *Reis*); Black and Reiss, "Patterns of Behavior in Police and Citizen Transactions". II *Studies of Crime and Law Enforcement in Major Metropolitan Areas,* (1967) at 97 (hereinafter *Black and Reiss*); Silberman, *Crisis in Black and White* (1964) at 50-53; United States Commission on Civil Rights, *Mexican-Americans and the Administration of Justice in the Southwest.* (1970), at 8. See *Cray* at 41-44 for graphic illustration of the racist nature of abuse of a Mexican-American woman and her family.

185 (hereinafter, *Task Force Report*); *Hairston* v. *Hutzler*, 331 F. Supp. 251, 253 (W.D. Pa. 1971) *aff'd* 468 F. 2d 621 (3 Cir. 1972).

The line between respect by the police for the individual rights of Blacks and other minority group people and invasion of those rights is so thinly drawn as to be virtually obliterated when an outrageous crime is perpetrated by a minority group person against a white or against police officers. At such times the entire police community become involved in violations of the rights of minority group persons, suspect only because of the color of their skin. And dragnet warrantless searches and seizures become almost routine. See e.g. *Lankford* v. *Gelston*, 365 F. 2d 197 (4th cir. 1966) involving a police search in the Black community in Baltimore, Maryland for suspects in the killing of a police officer. In the course of this search 300 homes were invaded. Similarly in San Francisco in 1974, a police sweep of streets for all black men of designated age and physical characteristics was instituted in search for suspects in the slaying of white people. New York Times, April 19, 1974 p. 1 col. 1, and p. 73 col. 3. A United States District Court Judge found that in the course of this search the constitutional rights of 600 young men had been violated. New York Times, April 26, 1974 p. 1 col. 1.

We do not believe that the numbers of persons subjected to abuse in any particular case is significant. It is the potential of the abuse that is a matter of concern. Moreover the "terrifying" experience to the persons whose homes were invaded as described in *Lankford*, 364 F. 2d at 201, is no less terrifying if only one, two or three persons' homes are invaded. While we appreciate the urgency of finding the suspect of a heinous crime, it is no reason to subject the community or even one of its members to the terror of the search.

The problem surrounding the application of the exclusionary rule is not that such application permits the guilty to go free. Rather, it is that the rule must be so applied as to inhibit the crimes practiced daily by the police on the Black and Brown people of our society, especially in those cases which threaten widespread invasion, such as the "serious" cases which Petitioner seeks to exempt from the exclusionary rule.

There is general agreement that police abuse has exacerbated[8] the existing intolerable conditions of people "confined in ghetto compounds of our cities, and . . . subjected to criminally inferior education, pervasive economic and job discrimination, committed to houses unfit for human habitation, subjected to unspeakable conditions of municipal services such as sanitation . . .". Dr. Kenneth Clark, testimony before the National Advisory Commission on Civil Disorders, quoted in *Report*, at 300.[9] "[P]olice excesses bear the seed of untoward counter reactions of violence." *Lankford*, 364 F. 2d n. 7 at 204. "Courts cannot shut their eyes to the events [of rebellions in the Black communities] . . . It is of the highest importance to community morale that the courts shall give firm and effective reassurances, especially to those who feel that they have been harassed by reason of their color or their poverty." *Id.* at 203-204.

No one would suggest that the high crime rate of our cities are the product of the exclusionary rule. The suggestion, however, is that the exclusionary rule has coddled the criminals by holding the reins tight against police illegal intrusions, and that such coddling must go to preserve law and order. This suggestion wholly ignores the fact that the sanction is designed not only to safeguard the rights of suspects, but also to protect the rights of innocent members of a community who have no connection with the crime but are identified as a suspect and whose rights are invaded solely because of their color or of political affiliation or of pure accident. The spector of the high crime rate among the poor and minority-group people has moved some people to

8. *Report*, at 299-309.

9. The conditions which Dr. Clark described in 1968 have undergone even further deterioration accelerated by the economic crisis, and its accompanying inflation and unemployment. A recent United States Department of Labor report establishes that 37.4% of young Blacks and other (referring to American-Indians and Asians) in the inner cities of the ages of 16-19 were unemployed as of August 1975. U.S. Department of Labor Release, no. 75-491, *The Employment Situation: August 1975*. The same report shows that the unemployment rate among Blacks is 14%, almost twice as high as the rate of Whites. These figures do not include the contingent labor force entrants.

identify the minority-group face as the face of the criminal. Hence the widespread illegal police invasions in these communities meet with little condemnation outside of the communities.

It is those who believe that crime and the minority group are synonomous who have been most vigorous in demanding the abandonment of constitutional safeguards under the rubric of "law and order."[10] But what they seek is the essence of lawlessness and disorder.

We believe that the pressures to eliminate the exclusionary rule reflect in substantial measure a philosophy of law enforcement at odds with the traditions of a democratic society to which we frequently point with pride. In the classic and often quoted words of Mr. Justice Brandeis (*Olmstead v. United States*, 277 U.S. 438, 575 dissenting):

> In a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the imnipresent teacher. For good or ill it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retributions. Against that pernicious doctrine this court should resolutely set its face." (Quoted with approval in *Mapp*, 367 U.S. at 659.)

"The knock at the door, whether by day or by night, as a prelude to search, without authority of law, but solely on the authority of the police" comes perilously close to the experience in Nazi Germany. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

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10. One political commentator has perceived in the "law and order" attacks against the decisions of this Court a racist underpinning aimed not only at curbing the rights of minority groups in the ghettos of our cities but also at curbing political dissent. Harris, Reflections: The New Justice, *New Yorker*, Mar. 25, 1972, 44.

III

THE MODIFICATION OR ELIMINATION OF THE EXCLUSIONARY RULE THREATENS FURTHER INCURSIONS ON THE PROTECTIONS OF FREEDOM OF EXPRESSION ERECTED BY THE FOURTH AMENDMENT.

The necessity of the Court to maintain the integrity of the judicial process is particularly high today. And the pressures for shortcuts to convictions induced, to a large extent, by the crises in our cities, are strong. Elimination of the exclusionary rule will not solve the problems of our cities, though it may in fact impair the democratic process at a time when lawlessness and the exercise of uncontrolled and arbitrary power by government agencies and high-placed officials, have already seriously tarnished its image.

The Fourth Amendment has its origins in the English experience and the experience in the colonies. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961). "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.*, at 729. The dangers to First Amendment freedoms posed by the government's abuse of the search and seizure power are no less real in the twentieth century setting. See e.g. *Stanford v. Texas*, 379 U.S. 476 (1965); *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972). In *District Court*, the electronic listening device had replaced the general warrant of *Entick* as the means of effectuating the unlawful search and seizure. Protection of "domestic security" had replaced censorship of "books, pamphlets and portraitures offensive to the state," *Marcus, supra*, at 725, as the government's justification for its invasions of privacy. Nevertheless Justice Powell invoked the same vlues which Lord Camden had upheld more than three centuries before to affirm the role of the Fourth Amendment as a safeguard of freedom of expression:

> "History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." 407 U.S. at 314.

It is generally acknowledged that Black and other minority group organizations, their leaders and members, as well as political dissenters have long been the prime target for government lawless invasions. Some indication of the nature of the group thus attacked and the allege methods used is given by Mr. Justice Douglas, in *District Court,* 407 U.S. at 330 n. 10 (concurring):

> Some insight into the scope of the current use of informers was provided by the Media Papers, F.B.I. documents stolen in early 1971 from a Bureau office in Media, Pennsylvania. The papers disclose F.B.I. attempts to infiltrate a conference of war resisters at Haverford College in August 1969, and a convention of the National Association of Black Students in June 1970. They also reveal F.B.I. endeavors "to recruit informers, ranging from bill collectors to apartment janitors, in an effort to develop constant surveillance in Black communities and New Left organizations (N.Y. Times, April 8, 1971, p. 22, col. 1). In Philadelphia's Black community, for instance, a whole range of building 'including offices of the Congress of Racial Equality, the Southern Christian Leadership Conference [and] the Black Coalition' (*ibid.*) was singled out for surveillance by building employees and other similar informers working for the F.B.I. Note, *Developments In The Law-The National Security Interest and Civil Liberties,* 85 Har. L. Rev. 1130 (1972).

The arrogance of uncontrolled power exerted by the Federal Bureau of Investigation was exposed on March 7, 1974 by the then Attorney General Saxbe when he revealed a four year effort by the Bureau to harass and disrupt Black militant organizations

and to especially prevent leadership from developing, New York Times, March 8, 1974, p. 16 col. 3. The case at bar is but one of the many illegal searches and seizures made against members of the Black Panther Party. See e.g. A Report by the Commission of Inquiry into the Black Panthers and the Police, Chairman, *Search and Destroy* (1973); Chevigny, *Cops and Rebels, A Study of Provocation* (1972).

The modification or abandonment of the exclusionary rule threatens further incursions on the protections of freedom of expression erected by the Fourth Amendment. "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressure to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *District Court,* 407 U.S. at p. 317. The attempt by petitioner and its supporting *amici,* to obtain this Court's sanction for the use in a criminal trial of evidence illegally obtained seems to us to be one more assault on the democratic process in the grim chapter of the history of illegal conduct by high government officials and agencies first disclosed in Watergate.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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